



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D**

**SOUTH AFRICA**

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This is the **summative (formal) assessment** for **Module 7D** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

**The mark awarded for this assessment will determine your final mark for Module 7D.** In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment7D]**. An example would be something along the following lines: 202122-336.assessment7D. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

## **ANSWER ALL THE QUESTIONS**

### **QUESTION 1 (multiple-choice questions) [10 marks in total]**

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Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

#### **Question 1.1**

The following categories of claims in these respective amounts have been proved against an insolvent estate:

Secured claims:	ZAR 2,000,000
Statutory preferent claims:	ZAR 1,500,000
Concurrent claims:	ZAR 1,000,000

Choose the **correct statement**:

- (a) The total amount of unsecured claims against the estate is ZAR 1,000,000.
- (b) **The total amount of unsecured claims against the estate is ZAR 2,500,000.**
- (c) The total amount of secured claims against the estate is ZAR 3,500,000.
- (d) The total amount of unsecured claims against the estate is ZAR 4,500,000.
- (e) None of the above is correct.

#### **Question 1.2**

Choose the **correct statement** in relation to impeachable dispositions and the powers of the officeholder to have dispositions set aside –

- (a) **A disposition not for value made by the company prior to being placed under liquidation may be set aside in terms of the provisions of section 26 of the Insolvency Act 24 of 1936.**
- (b) A disposition preferring one creditor above another made by the company prior to being placed under business may be set aside in terms of the provisions of section 29 of the Insolvency Act 24 of 1936.
- (c) A disposition with the intention to prefer one creditor above another made by the company prior to being placed under business may be set aside in terms of section 30 of the Insolvency Act 24 of 1936.

- (d) **None of the above are correct.**

### Question 1.3

Choose the **correct option** in relation to the following statement: After sequestration, the assets of the insolvent vests in the Master until a business rescue practitioner is appointed.

- (a) The statement is correct.
- (b) The statement is incorrect, as the assets remain under the control of the insolvent until the officeholder is appointed.
- (c) The statement is incorrect as the officeholder in sequestration is a trustee.**
- (d) Options (b) and (c) are correct.

### Question 1.4

Which of the following does a debtor not have to prove when bringing an application for voluntary surrender:

- (i) That sequestration will be to the advantage of creditors.
- (ii) That there is reason to believe that sequestration will be to the advantage of creditors.
- (iii) That an act of insolvency was committed by the debtor.
- (iv) That there will be sufficient free residue to cover the costs of sequestration.

Choose the **correct answer**:

- (a) Option (ii).
- (b) Options (ii) and (iv).
- (c) Option (iii).
- (d) Options (ii) and (iii).**

### Question 1.5

In February 2021 Company X was placed in liquidation. The liquidator of Company X became aware of the fact that Company X disposed of property worth ZAR 12,000 to Company Z for an amount of ZAR 7,000 during September 2020. Directly after the disposition, Company X's liabilities exceeded its assets by ZAR 8,000. **If the disposition is set aside –**

- (a) Company Z will be required to return ZAR 12,000 to the liquidator of Company X.
- (b) Company Z will be required to return ZAR 8,000 to the liquidator of Company X.**
- (c) Company Z will be required to return ZAR 7,000 to the liquidator of Company X.**
- (d) Company Z will be required to return ZAR 5,000 to the liquidator of Company X.

### Question 1.6

Which of the following is correct in relation to jurisdiction in insolvency related matters:

- (i) The High Court has exclusive jurisdiction in insolvency related matters.
- (ii) The High Court has exclusive jurisdiction to grand liquidation orders.
- (iii) The Insolvency Court has exclusive jurisdiction in insolvency related matters.
- (iv) A Magistrate's Court with jurisdiction may in certain instances hear matters related to the insolvent estate.

Choose the **correct answer**:

- (a) Option (i).
- (b) Options (ii) and (iii).
- (c) Option (iii).
- (d) Options (ii) and (iv).

### Question 1.7

A cause of action established by a foreign judgment can be enforced if certain common law requirements are met. Which of the following is **not** such a common law requirement:

- (a) The foreign court must have had international competence as determined by South African law.
- (b) The enforcement of the judgment must not be contrary to South African public policy or the concept of natural justice, but the judgment need not be final and conclusive.
- (c) The enforcement of the judgment must not be contrary to South African public policy or the concept of natural justice.
- (d) The judgment must not have been obtained fraudulently.

### Question 1.8

Company A wishes to obtain funding to utilise as working capital in order to expand its exploration and mining enterprises. Company A has various subsidiaries, and Bank XYZ, as lender, requires Company A to provide some of its shares in its subsidiaries as security to the bank in order to secure the loan. This form of security is known as a –

- (a) Pledge.
- (b) Hypothec.
- (c) Cession in security of a debt (*in securitatem debiti*).
- (d) Special notarial bond.

### Question 1.9

An insolvent debtor **may not** hold the following office, unless exemption has been granted by a court:

- (a) A trustee of an insolvent estate.
- (b) A member of the National Assembly.
- (c) A business rescue practitioner.
- (d) A director of a company.**

### Question 1.10

In accordance with the South African common law dealing with cross-border insolvency, the assets of an insolvent are governed as follows:

- (a) Movable property is governed by the law of the natural person's domicile (*lex domicilii*).**
- (b) Movable property is governed by the law of the natural person's domicile (*lex situs*).
- (c) Immovable property is governed by the law of the place where the immovable property is situated (*lex domicilii*).
- (d) Immovable property is governed by the law of law of the natural person's domicile (*lex situs*).

## QUESTION 2 (direct questions) [10 marks in total]

### Question 2.1 [maximum 2 marks]

Briefly **differentiate between the commencement** of voluntary and compulsory business rescue proceedings.

In accordance with section 129 of the Companies Act, voluntary business rescue proceedings are commenced by the board of a company adopting a resolution to this effect and the proceedings are commenced once the resolution is filed with the CIPC. Whereas in accordance with section 131 of the Companies Act, compulsory business rescue proceedings are initiated by a court order resulting from an application brought by an affected person.

### Question 2.2 [maximum 8 marks]

Briefly set out and explain the **threshold** for a company to enter business rescue proceedings.

A company can seek the commencement of business rescue proceedings if it appears unlikely to be able to pay all its debts as they fall due within the next six months, or if it appears likely that the company will become insolvent within the following six months.

Per the Companies Act 2008 rescuing a company entails 'maximising the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders

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than would result from the immediate liquidation of the company'. Therefore, business rescue proceedings may be used where a company:

- Is under financial distress but there is a reasonable prospect that by making use of business rescue the company will continue in existence on a solvent basis. This could include a business which has a large upcoming debt repayment (eg. Repayment of a bank loan) for which it does not anticipate having sufficient assets to repay at the date of repayment, but the company is profitable therefore if an extension or reduction in the debt payable to the bank could be negotiated through business rescue proceedings the business could emerge as a going concern.
- Where there is no reasonable prospect of the company continuing in existence, but business rescue will yield a better result for the creditors or shareholders than the immediate liquidation of the company. For example, in the event that a company is working on delivering a product for which it will receive payment on delivery (with the proceeds exceeding the cost of finishing the product), by continuing for several months to complete the product and in turn receiving full payment the return for creditors would be better than if the company immediately enters liquidation and the contract is halted and the company receives no further revenue.

### QUESTION 3 (essay-type question) [15 marks]

ABC Limited conducts smelting operations for a local gold mine, which gold mine has recently sunk two new shafts. As a result thereof, the amount of gold ore extracted has increased significantly, and ABC Limited is not able to process all of the ore with the existing smelters that it has. The board of ABC Limited has taken the decision to apply for funding in order to build and install new smelters. ABC Limited's bank, XYZ Bank, has indicated its willingness to provide ABC Limited with the required funds, but subject to a significant security package. ABC Limited owns the following unencumbered property, or has the following available to provide as possible security: (i) the land on which the smelting operations are located; (ii) the existing freestanding and movable smelters; (iii) 100% shares in one of its subsidiaries, DEF Limited; and (iv) various business insurance policies.

#### Question 3.1 [maximum 10 marks]

Advise ABC Limited as to the various types of security that XYZ Bank may be willing to consider, based on the list of available items above. Your answer should also include any practical considerations that XYZ Bank would bear in mind when deciding what to take as security, as well as a brief description of each type of security to be taken.

In respect of the land on which the smelting operations are located XYZ Bank may be willing to consider a special mortgage over the land as security. Special mortgage security in the form of a mortgage bond given the land is immovable. Should a mortgage bond be provided in order to constitute the right of security over the land XYZ Bank would need to register the mortgage bond against the title deed of the land in the deeds office. ABC Limited should be made aware that were a mortgage bond be obtained by XYZ bank, ABC Limited would be unable to transfer ownership of the land without the mortgage bond being cancelled or without obtaining written consent of the mortgage bond holder, being XYZ bank.

XYZ Bank preference would be for the land to be provided as security given it is a non-depreciating asset (unlike the smelters), potentially easier to value and likely to be easiest to monetise should they have to enforce on the security.

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Discussion could have included more information in re insurance policies.

In respect of the freestanding and movable smelters XYZ bank could obtain security in the form of a special notarial bond, as the smelters are moveable property. Should XYZ obtain security in this form they would need to register it in the deeds office in accordance with the terms of section 1 of the Security by Means of Moveable Property Act. Once registered at the deeds office the moveable smelters would be deemed to have been pledged to XYZ Bank.

ABC Limited could also pledge the land or smelters to XYZ bank, however, in order for the right of security to be created the assets pledged must be delivered to the creditor, with the pledge remaining effective for as long as the creditor remains in possession of the property. Given ABC limited requires the land and smelters for its business operations pledging them would not be practicable.

The shares in DEF Limited could be pledged as security by means of a cession as security for debt (*securitatem debiti*). This form of security would be created by an agreement between ABC Limited and XYZ bank and there would be no registration requirements for its validity. In this scenario XYZ Bank would need to consider whether the cession is an out-and-out cession or whether the cession is a pledge of a personal right. The distinction between the two would effect XYZ's rights in the event of sequestration of ABC's estate. In an out-and-out cession ownership of DEF Limited's shares would transfer to XYZ bank whereas with a pledge the ownership in DEF Limited's shares would remain with ABC Limited and XYZ Bank would only be able to exercise the rights associated with the cession upon default of payment.

In respect of ABC's insurance policies XYZ may not wish to take these as security as in the event of insolvency they would have no value. In addition, should ABC Limited need to claim on its insurance (for example in the event its premises burnt down in a fire) were XYZ to take the security it could mean that ABC would be unable to continue as a business. If the insurance policies were life insurance policies then XYZ Bank may be more interested in taking them as security.

**Question 3.2 [maximum 5 marks]**

For this question 3.2 only, assume that XYZ Bank has provided ABC Limited with the required funding, and has taken security as per your answer in question 3.1 above. Due to a downswing in the economy and a global decrease in the demand for gold, ABC Limited is unable to repay its obligation towards XYZ Bank. XYZ Bank has brought a liquidation application in the High Court, and a final liquidation order has been granted against ABC Limited. How would XYZ Bank go about enforcing its security?

*(Please note that the guidance text does not contain comprehensive information on enforcement in relation to all of the applicable forms of security in this set of facts, as it falls outside of the scope of this certificate. Students are simply required to answer this question with reference to the available material, and no other further research is required.)*

In respect of the smelters (movable property) XYZ bank would be required to inform the Master (and trustee if appointed) in writing of their security interest in the smelters before the second meeting of creditors. XYZ limited may be able to realise the smelters themselves, if they did so they would be required to subsequently prove a claim against ABC Limited in terms of section 44 of the Insolvency Act. If XYZ Bank did not realise the smelters themselves and had possession of the smelters they would be required to deliver the property to the trustee and prove a claim against the insolvent estate (XYZ bank would not lose security by delivering the asset to the trustee). XYZ Bank would then notify the trustee in writing of their rights and subsequently prove a claim against ABC Limited's estate.

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Could have included discussion in re instances where creditor may realise proceeds itself.



In respect of the land (immovable object) XYZ bank would not be able to realise the land themselves. If XYZ bank were to value the land when proving their claim the trustee of ABC Limited's estate may, if authorised by the creditors, within three months from the date of their appointment or from the date of the proof of the claim (whichever is later) take over the immovable object at the value placed thereon by XYZ bank when their claim was proved. If the trustee were not within that period to take control of the land they would have to realise the land for the benefit of all creditors whose claims are secured by the land (XYZ bank in this scenario)

In respect of the shares of DEF Limited the options available to XYZ Limited depend on the type of cession granted, if the cession of DEF Limited's shares was a pledge then XYZ Bank would become a secured creditor of ABC Limited's estate but if the cession of DEF Limited's shares was an out-and-out cession then XYZ Bank would become the legal owner of DEF Limited's shares and could realise the shares without heeding ABC Limited's insolvency proceedings.

**QUESTION 4 (fact-based application-type question) [15 marks]**

Money Problems NZ Limited (Money Problems NZ) is a company duly registered in terms of New Zealand company law. Money Problems SA Limited (Money Problems SA) is registered in South Africa as an external company and is a subsidiary of Money Problems NZ. Money Problems NZ was placed under liquidation in New Zealand on 31 August 2020 as a result of inability to pay its debts. Shortly thereafter Mrs B was appointed as the liquidator of Money Problems NZ. On 17 October 2020 a creditor of Money Problems SA made it clear that he intended approaching the High Court in South Africa for an order to wind-up Money Problems SA in terms of the Companies Act 61 of 1973 on the ground that it is unable to pay its debts. Mrs B has not yet approached the High Court in South Africa for recognition. The affairs of Money Problems NZ seem to be rather convoluted and only on 10 October 2020 did Mrs B come to learn that Money Problems NZ has assets in South Africa. Mrs B plans to apply to the South African High Court for recognition in due course.

You are required to draft an opinion addressed to Mrs B on the possible conclusions that may be reached by the South African High Court under the present circumstances. Your opinion should include specific reference to, among other things, –

- (a) whether the court might recognise the foreign proceedings or the foreign officeholder;
- (b) whether the court might order the liquidation of Money Problems SA given the current liquidation of Money Problems NZ;
- (c) factors that the court will take into consideration when drawing a conclusion; and
- (d) the content of a possible declaratory order that the court may make.

If you are of the opinion that you need additional facts in order to answer the question effectively, please indicate what facts you would require and how these facts would affect your answer.

Dear Ms B,

In respect of your enquiry in relation to obtaining recognition of the foreign proceedings please be advised that contrary to the practice in many foreign jurisdictions in South Africa it is the

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Could have included discussion on Sackstein v Proudfoot; content of order

foreign officeholder that is recognised rather than the foreign insolvency proceedings (albeit foreign proceedings have been recognised in South Africa such as Overseas Shipholding Group, Inc and 180 others). South African courts have held that a foreign officeholder required recognition by an order of a South African court before being entitled to deal with local assets and the court exercises discretion and is guided by grounds of comity and convenience (see *LaMonica v In re Eastwind Development SA*). Ms. B would need to apply to the High Court for recognition. The High Court will grant a rule nisi nisi to issue and publish the application, calling on all persons concerned to show any cause against the granting of this application. In order to apply for recognition Ms. B would need to show she was appointed where Money Problems NZ was incorporated (which she should given she has a court order from the New Zealand court) and can show her claim is genuine.

Typically the South African court has a preference for a single proceeding with the general rule being that the court of the domicile should direct the main sequestration and that all other decrees should be ancillary or subsidiary. Given this it is likely that the court would not order the liquidation of Money Problems SA should the court deem a single liquidation order (such as the one already obtained by Ms B in New Zealand) to be more convenient and the court be satisfied that the interests of local creditors of Money Problems SA would be as well protected in the foreign proceedings as if a local winding up order was granted.

Should Ms. B be successful in obtaining recognition as a foreign officeholder the order does not make the debtor an insolvent company in South Africa. The recognition order issued by the South African court is a declaratory order regarding the foreign officeholder's entitlement, subject to local requirements, to administer the assets as through they were in the jurisdiction from which Ms B derives her authority, being New Zealand. Ms. B would have to request the court grant her the necessary powers to enable her to administer the property situated in court's jurisdiction. More information would be required in respect of the type of assets held by Money Problems SA and whether Ms. B planned to undertake investigative activities in order to determine the powers she should seek from the court.

**\* End of Assessment \***